28 CFR Part 16 §16.21 Purpose and Scope

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena,

order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. attorneys, U.S. marshals, U.S. trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal

operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

28 CFR Part 16 §16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without

prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the United States Attorney for the district where the issuing authority is located. The responsible United States attorney shall follow procedures set forth in §16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible United States attorney. Any authorization for testimony

by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible United States attorney shall request a summary of the information sought and its relevance to the proceeding.

28 CFR Part 16 §16.24 Procedure in the event of a demand where disclosure is not otherwise authorized

(a) Whenever a matter is referred under §16.22 of this part to a United States Attorney, or under §16.23 of the EOUST, or their designees (hereinafter collectively referred to as the "responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was

responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the "originating component"), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in §16.26(a) of this part; and

(3) None of the factors specified in §16.26(b) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible: Provided, That, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the

EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in §16.26 of this part.

(d)(1) In a case in which the United States is not a party, if the responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or

prepared in connection with litigation or an investigation supervised by a division of this Department of the EOUST. If so, the U.S. Attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in §16.26(b) of this part exists with respect to the demanded disclosure.

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary,

appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in §16.26 of this part, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant Attorney

General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in §16.24(d)(1)(i)-(iii) of this part: Provided, That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy

or Associate Attorney General as indicated in §16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim or privilege, the responsible

official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

JAMES PARKER, individually and as Administrator of the Estate of JAY PARKER,

Plaintiff,

- against -

THE COUNTY OF NASSAU et al.,

Defendants.

- - - - - - - - - - - - - - - - x

DOCKET NO. CV 81-0466

MEMORANDUM AND ORDER

APPEARANCES:

ROBERT RIVERS, P.C.
Attorney for Plaintiff
393 Front Street, Suite 411
Hempstead, New York 11550

NASSAU COUNTY ATTORNEY
By Joanna Seybert
Nassau County Executive Building
One West Street
Mineola, New York 11501

AXELROD, CORNACHIO & FAMIGHETTI
By Joseph Famighetti
300 Old Country Road
Mineola, New York 11501

PRATT, J.:

Plaintiff brought this §1983 action seeking damages because his son,

Jay Parker, was fatally shot by defendant Boyle in the course of an attempted arrest. At the end of plaintiff's case, the action was dismissed as against defendants Talt and Nassau County on the ground that plaintiff had failed to make out a prima facie case against them.

Plaintiff conceded that defendant Boyle, who actually fired the fatal shots, had probable cause to make an arrest, and Boyle himself conceded that he did fire the shots which cost Parker his life. Consequently, the only issue submitted to the jury was Boyle's defense of qualified immunity. That issue was submitted in the form of a special verdict which inquired:

> Did defendant Boyle reasonably believe that shooting Jay Parker was necessary to protect himself or others from imminent use of deadly force?

After five hours of deliberation the jury answered the question "yes".

Accordingly, the clerk is directed to enter judgment dismissing the complaint against all defendants.

SO ORDERED.

Dated: Uniondale, New York
April 14, 1982.

/s/ George C. Pratt
GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

JAMES PARKER, individually
and as Administrator of the
Estate of JAY PARKER,

Plaintiff, JUDGMENT

- against- CV 81-0466
(GCP)

THE COUNTY OF NASSAU et al.,

Defendants.

- - - - - - - - - - - - - - - - x

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on April 16, 1982, directing the Clerk of Court to enter judgment dismissing the complaint against all defendants, it is

ORDERED AND ADJUDGED that the plaintiff take nothing of the defendants, and that judgment is hereby entered dismissing the complaint against all defendants.

RICHARD H. WEARE,
Clerk of Court

By: /s/ Robert C. Heinemann
Robert C. Heinemann,
Chief Deputy Clerk

Dated: Brooklyn, New York
April 22, 1982

F I L E D
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D.N.Y.
APR 22 1982

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21 day of October, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge
HON. LAWRENCE W. PIERCE,
Circuit Judge
HON. INZER B. WYATT,
District Judge*

- - - - - - - - - - - - - - - - x

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of JAY PARKER,

Plaintiffs-Appellants, ORDER
82-7390

v.

*Of the Southern District of New York, sitting by designation.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE AND OFFICER JOHN TALT,

Defendants-Appellees.

- - - - - - - - - - - - - - - - x

Plaintiffs appeal from an order of the United States District Court for the Eastern District of New York, Pratt, J., which directed the entry of judgment in favor of all defendants. The complaint against the defendants, County of Nassau and John Talt, was dismissed at the close of the evidence. The complaint was dismissed as against the defendant Boyle following a special jury verdict. We affirm.

A county such as Nassau can be held liable for the constitutional torts of its police officers only if the torts were committed pursuant to some official policy or resulted from grossly negligent or deliberately indifferent lack of train-

ing. Owens v. Haas, 601 F.2d 1242, 1245-46 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980). Because there was a complete failure of proof on this issue, the complaint as against the County was properly dismissed. The proof conclusively established that Officer Talt did not participate in the shooting of the decedent.

Appellants' contention that the district court abused its discretion in submitting the case to the jury in the form of a special verdict is without merit. No objection was made at the time of submission and there was nothing inherently improper in the practice.

We find no error in the trial court's discretionary evidentiary ruling on the photographs, United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976), or in its order quashing the subpoena of F.B.I. records, see 28 C.F.R. § 16.21 and United States ex rel. Touhy v. Ragen, 340

U.S. 462 (1951).

Affirmed.

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/ Lawrence W. Pierce
Hon. Lawrence W. Pierce

/s/ Inzer B. Wyatt
Hon. Inzer B. Wyatt

F I L E D
OCT 21 1982
L. DANIEL FUSARO, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT